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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 510

LEONARD J. SACHS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 414–417; Pet. Appendix II) is reported at 293 F. 2d 623. The opinion of the district court (R. 10–15; Pet. Appendix I) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1961 (R. 418; Pet. App. 23–24). A petition for rehearing (R. 419–427) was denied on September 22, 1961 (R. 428; Pet. App. 24). The petition for a writ of certiorari was filed on October 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether false statements made in a financial report submitted to the United States Air Force to show capacity to perform a procurement contract were material although the contract was in fact satisfactorily performed.

2. Whether the court of appeals failed to pass upon all of petitioner's assignments of error.

3. Whether an indictment for making a false statement to the Small Business Administration should have been dismissed because brought under 18 U.S.C. 1001 rather than 15 U.S.C. 645(a).

STATUTES INVOLVED

Section 1001 of Title 18 U.S.C. provides:

> *Statements or entries generally.*—Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 2 of Title 18 U.S.C. provides:

Principals.—

> (a) Whoever commits an offense against the United States or aids, abets, counsels, induces or procures its commission, is punishable as a principal.

> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Former 15 U.S.C. 638(a), Section 209(a) of the Act of July 30, 1953, 67 Stat. 237 [now 15 U.S.C. 645(a)] provided as follows:

> (a) Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment of action, or otherwise, or the acceptance, release, or substitution of security therefor, or for the purpose of influencing in any way the action of the Administration, or for the purpose of obtaining money, property, or anything of value, under this chapter, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

STATEMENT

Petitioner Leonard J. Sachs and William Sachs (not presently involved), the president and secretary-treasurer, respectively, of Fulton Trouser Company, Inc., were charged in count 1 of an indictment returned in the United States District Court for the Northern District of Georgia, with knowingly and willfully making a false balance sheet and statement of income, profit, and loss for Fulton on March 27, 1954, in a matter within the jurisdiction of the United States Air Force for the purpose of obtaining a clothing contract from the Air Force (R. 2–3). Count

2 charged these defendants with making willful misstatements in a matter within the jurisdiction of the Small Business Administration by a letter dated April 28, 1954, for the purpose of having certain corporations designated as small business concerns (R. 3–5). The acts are alleged to be in violation of 18 U.S.C. 2 and 1001. Prior to trial a defense motion to dismiss count 2, on the ground *inter alia* that it did not state an offense under 18 U.S.C. 1001 (R. 5–9), was overruled by the district court (R. 10–15). The jury found the defendants guilty on both counts (R. 395). Petitioner was sentenced to imprisonment for two years on count 1, and two years on count 2 to run concurrently with the sentence on count 1 (R. 406–408). On appeal (R. 408) the conviction was affirmed (R. 418; Pet. App. 23–24).

Pertinent evidence adduced at the trial may be summarized as follows:

During the latter part of February 1954, one Young, a financial analyst for the Warner Robins Air Materiel Area at Robins Air Force Base, Georgia, was conducting an investigation to determine the financial capacity of the Fulton Trouser Company to perform an Air Force contract (R. 29-30). Young and Lt. Schneider, an Air Force accountant, went to Fulton's place of business where they talked with William Sachs and others, and telephoned Fulton's accountant, Gertz. They emphasized the urgency of obtaining a late financial statement (R. 33–35, 80–82), and the Fulton representatives promised to furnish one accurate as of Feb-

ru. ry 28, 1954, and thus more current than the preceding one of December 31, 1953 (R. 45, 77). It was indicated that a cash position of $548.46 as of December 31, 1953, would be replaced by a $16,000 figure as of February 28, 1954 (R. 46), and that the new statement would show $50,000 paid to the corporation in exchange for preferred stock since December 31, 1953 (R. 46–47, 78). At a later meeting the petitioner told Young that the $50,000 in exchange for preferred stock had been paid in (R. 37) and that the cash position had improved to $16,000 (R. 48).

A letter dated March 27, 1954, to Warner Robins Air Materiel Area, signed by petitioner as president of Fulton, with an attached balance sheet as of February 28, 1954, and a statement of Fulton's income, profit, and loss, from January 1, 1954, to February 28, 1954, was introduced in evidence as Gov. Ex. 7 as the basis for count 1 of the indictment (R. 26, 38). The letter and statements had been prepared under the direction of petitioner, who had given his secretary a penciled copy from which to prepare the statements (R. 105–106). An F.B.I. accountant, in the examination of Fulton's books, found that instead of having $16,837.94 cash on hand as shown on Gov. Ex. 7, Fulton was overdrawn in the amount of $24,421.06 (R. 287); that the accounts receivable item of $96,119.97 was not correct, but as of February 28, 1954, amounted to $10,476.24 (R. 288–289); that Fulton's books showed withholding taxes of $32,946.20 owing as of February 28, 1954, but this item did not appear on the balance sheet (R. 297–298); that although

there was a journal entry in Fulton's books concerning the issuance of $50,000 of preferred stock in March 1954, there was no entry reflecting the payment to Fulton of $50,000 (R. 300–301); and that an analysis comparing the financial statement and the company's books showed a difference in net profit of $3,233.15 (R. 309). The financial analyst, Young, testified that if he had known the true situation as to the debt for withholding taxes, the overdrawn cash position, and the $50,000 preferred stock, he would not have been able to approve the contract (R. 49, 51–54). The $296,320 contract involved (Gov. Ex. 15) was awarded to Fulton on April 30, 1954 (R. 195) and was performed satisfactorily (R. 150, 190–194, 358–359).

As to count 2, there was introduced in evidence Gov. Ex. 9, a letter dated April 28, 1954, signed by William Sachs as secretary-treasurer of the Henry Garment Company, and prepared by the petitioner's secretary under petitioner's direction (R. 4–5, 105–109). The letter, a response to a request for information by the Small Business Administration, stated that the Henry Garment Company and the Fulton Trouser Company were affiliated companies with 103 and 375 employees, respectively, but that these companies had no financial or organizational connection with Will Manufacturing Company and Federal Sportswear (R. 4–5, 245, 250–252). Under the Small Business Administration regulations[1] if different companies were affiliated and had more than 500

[1] See 13 C.F.R. § 121.3—1, 2 and 3.

employees they would not be considered eligible for small business government contracts (R. 246–248, 259–260). There was evidence that petitioner controlled all four companies and all had their books at the same location and used the same garment cutting room (R. 98–103, 140–143, 145–146, 174). The total number of employees of the four companies was approximately 800 during the period in question (R. 312–315, 319). If the letter had shown that the four companies were affiliated and had more than 500 employees, the Small Business Administration representative would have given a negative report (R. 262).

The court charged the jury as a matter of law that the United States Air Force, Air Materiel Command, was an agency or department of the United States within the meaning of 18 U.S.C. 1001; that the Small Business Administration was a department or agency of the United States within that section; and that the two letter exhibits (Gov. Ex. 7 as to count 1 and Gov. Ex. 9 as to count 2) constituted statements of material facts within that statute (R. 379–381). The court charged that whether the United States lost, or did not lose, as a result of the award of the contract, was immaterial, except for whatever light it might shed on the question of the intent of the defendants and the question of the falsity of the documents (R. 381). The jury was further charged regarding small businesses and affiliation and common control or ownership (R. 382–383).

ARGUMENT

1. Petitioner asserts that, since the goods were satisfactorily produced under the contract, the false representations in the financial statement to the Air Force could not be material within the purview of 18 U.S.C. 1001 (Pet. 9–11). The fact that the government suffered no pecuniary or property loss as a result of the false statements does not, however, show that they were not material. *United States* v. *Gilliland*, 312 U.S. 86, 93.

The test as to materiality of a false statement is whether it has a natural tendency to influence, or is capable of influencing, the officials to whom it is presented in making a determination approving the contract. *Weinstock* v. *United States*, 231 F. 2d 699, 701, 702 (C.A.D.C.); *Gonzales* v. *United States*, 286 F. 2d 118, 122 (C.A. 10), certiorari denied, 365 U.S. 878. Here the false statements had more than a mere tendency to influence; they actually did mislead the government officials into approving the contract. If the officials had known of the excessive amount of unpaid withholding taxes, of the grossly misstated cash position, and of the true situation as to the $50,000 in preferred stock, they would not have approved execution of the contract. In these circumstances it is clear that the false statements in the financial report were material, as the district court found.

Petitioner's reliance upon *Freidus* v. *United States*, 223 F. 2d 598 (C.A. D.C.) and *Weinstock* v. *United States*, 231 F. 2d 699 (C.A. D.C.), is misplaced. In

Freidus the financial statement submitted was not sufficiently current and thus was never considered by the RFC. There was no actual possibility that the agency would be influenced by, or induced to act upon, the alleged false statements contained therein. In *Weinstock* the alleged false statement was considered not material because, unlike the situation here, the statement was just one part of a very lengthy affidavit and thus was without weight or influence in any decision to be made by the Subversive Activities Control Board.

2. Petitioner complains that in deciding the appeal the court of appeals ignored three of his assignments of error (Pet. 12–13). In the last paragraph the opinion states, "No reversible error appearing, the judgment is Affirmed" (Pet. App. 23). Implicit in this statement is a considered rejection of petitioner's assignments of error even though not expressly spelled out. The court of appeals could properly feel that the claims did not merit discussion.

a. The sufficiency of the evidence to support a conviction on count 2 of the indictment is clearly established by the summary of evidence bearing on this count in the Statement, *supra*, pp. 6–7.

b. There was no error in permitting testimony by Internal Revenue Service agent Remillard that Fulton owed $34,872.74 in FICA and withholding taxes as of February 28, 1954, the date of the financial statement involved in count 1. This evidence came in over objection on direct examination of the agent as part of the government's case (R. 146–148, 151–

153). On cross-examination petitioner's counsel asked what portion of these taxes had been paid, but objection to this question was sustained as not being material (R. 153–154). The agent was then asked whether the taxes were paid on or before March 27, 1954, and he replied that he did not know (R. 154-155).

This testimony as to the unpaid taxes was relevant and admissible since they were not entered on the financial statement as one of Fulton's liabilities. The statement was false as of February 28, 1954, and it was immaterial whether the taxes were paid at some later date. Long before objection to agent Remillard's testimony, moreover, government evidence as to these taxes had come in without objection (R. 49, 53, 54) and defense counsel had even mentioned them in cross-examination of government witnesses (R. 64, 91).

c. Finally there was no error in admitting in evidence Gov. Exs. 10, 11, 12 and 13 over objection (R. 112–117, 119–123). In each of these affidavits dated November 16, 1953, executed in connection with a guaranty of Fulton to Jones & Company, petitioner stated that he owned 100% of the shares of stock in the four corporations, Fulton, Federal, Will, and Henry. The court carefully pointed out to the jury, in response to petitioner's objection, that these documents had not been submitted to the Small Business Administration. It further instructed that they were submitted only for whatever light they might shed on the issue of the truth or falsity of Gov. Ex. 9, the

letter of April 28, 1954, to the Small Business Administration—a matter as to which they were relevant and material (R. 122–123). Finally, as to defense counsel's objection that these documents were earlier than petitioner's letter to the Administration, the court offered to hear evidence that the documents were obsolete by reason of later stock transfers, but counsel admitted that he had no evidence of a formal stock transfer by petitioner (R. 114, 116–117).

3. Petitioner also raises a question of the validity of the indictment and sufficiency of the evidence on count 2. He argues that he could not be prosecuted on count 2 under the general false statement statute, 18 U.S.C. 1001 (*supra*, p. 2), but only under 15 U.S.C. 638(a), now 15 U.S.C. 645(a) (*supra*, p. 3), specifically covering false statements to the Small Business Administration (Pet. 8–9). These issues need not be reached since the sentence on count 2 is concurrent with that on count 1. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Lawn* v. *United States*, 355 U.S. 339, 359. Moreover the sentence imposed on count 2 is within the maximum that could have been imposed if the prosecution had been brought under 15 U.S.C. 645(a). There is no difference in the elements of the offense under the statutes except possibly a heavier burden on the government under 18 U.S.C. 1001 since that statute contains more exacting language, "knowingly and willfully," whereas 15 U.S.C. 645(a) speaks merely of making a statement "knowing" it to be false. Hence petitioner cannot claim prejudice even if the wrong statute were cited.

In any event there is nothing in the Small Business Administration statute to indicate that Congress intended a pro tanto repeal of the general fraud statute to eliminate from the purview of the latter statute false statements made to that Administration. *United States* v. *Gilliland*, 312 U.S. 86, 95–96; *Ehrlich* v. *United States*, 238 F. 2d 481, 485 (C.A. 5); *United States* v. *Greenberg*, 268 F. 2d 120, 122 (C.A. 2); *United States* v. *Quirk*, 266 F. 2d 26 (C.A. 3); and see *Berra* v. *United States*, 351 U.S. 131.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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